INTRODUCTION

On December 23, 1997, the U.S. Department of Labor, Office of Workers Compensation Programs (OWCP), proposed to revise the regulations governing the administration of the Federal Employees' Compensation Act (FECA). The FECA provides compensation for wage loss, medical care, and vocational rehabilitation to Federal employees and certain other individuals who are injured in the performance of their duties, or who develop illness as a result of factors of their Federal employment. It also provides monetary benefits to the survivors of employees who are killed in the performance of duty or die as a result of factors of their Federal employment. OWCP administers the FECA.

Last revised in 1987, OWCP felt that a comprehensive revision was in order due to several factors. First, new provisions have been added to the statute necessitating clarification or revision to improve and streamline the claims process. Further, a significant increase in the number and complexity of OWCP issues requiring adjudication has strained the administrative resources available to fulfill OWCP's statutory mandate to adjudicate and administer claims. Finally, several new developments have enabled OWCP to devise a fee schedule applicable to hospital inpatient and pharmacy bills. For all of these reasons, the rules were entirely rewritten.

Besides significant revision to the actual text of the regulations, the style and format of the document have been changed as well. Reorganized into a format reflecting the claims process itself, the new regulations are presented in a question-and-answer format instead of the narrative form used in the former rules. Unnecessary information has been deleted, language duplicative of the statute has been removed from various portions of the regulations, which have been renumbered, and the sections have been regrouped by type of claims where appropriate. Despite DoD's assertion that they found the new question-and-answer format to be problematic, OWCP opined that the new organization and style presents the information in a way consistent with the needs of the user and will help the reader more readily find information.

Prior to implementing the new regulations, OWCP solicited comments and suggestions to the proposed changes from all interested parties, which were to be submitted within 60 days from the date of the proposal.

OWCP received comments from 23 parties, including 12 from other Federal employing agencies, seven by labor organizations which represent Federal employees, two by attorneys, one by a physician, and one by a Department of Labor employee. In their final rule issued on November 25, 1998, OWCP provided an analysis of the comments received, and indicated in which instances appropriate changes were made and in other instances when the comment or recommendation was not adopted. The new regulations were implemented on January 4, 1999, and apply to all cases where an initial decision on a particular issued is made on or after the effective date, including cases where the injury or death occurred prior to the effective date. However, they do not apply to issues decided for the first time before the effective date, even when such decision is being reviewed after

a hearing before an OWCP representative, on reconsideration before OWCP, or on appeal to the Employees' Compensation Appeals Board (ECAB).

This document will summarize the important changes implemented in the new regulations, laying out the old regulations, the proposed change set forth by OWCP on December 23, 1997.

PART 10 - CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED

Subpart A-General Provisions

§10.5 (x) and (y)

New Regulation: This new provision provides a more descriptive discussion of recurrence of disability, which reflects OWCP's understanding of the term as explained by the ECAB in numerous cases which have thoroughly examined both the medical and non-medical aspects of this issue, and enables OWCP to address issues that may arise in this era of government downsizing as agencies close work sites:

(x) Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.

(y) Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a ``need for further medical treatment after release from treatment,'' nor is an examination without treatment.

Previous regulation: The previous regulation merely stated that a recurrence occurs when the original injury causes the employee to stop work again, with no further elaboration.

§10.17 and §10.18

New Regulation: New provisions now appear addressing suspension of benefits during incarceration and termination of benefits for conviction of fraud against the program:

Sec. 10.17 When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition.

Sec. 10.18 (a) Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits during the

period of incarceration. A beneficiary's right to compensation benefits for the period of his or her incarceration is not restored after such incarceration ends, even though payment of compensation benefits may resume. (b) If the beneficiary has eligible dependents, OWCP will pay compensation to such dependents at a reduced rate during the period of his or her incarceration, by applying the percentages of 5 U.S.C. 8133(a)(1) through (5) to the beneficiary's gross current entitlement rather than to the beneficiary's monthly pay. (c) If OWCP's decision on entitlement is pending when the period of incarceration begins, and compensation is due for a period of time prior to such incarceration, payment for that period will only be made to the beneficiary following his or her release.

Previous regulation: Neither one of these provisions, which are recent additions to the FECA, previously appeared in the regulations.

Subpart B – Filing Notices and Claims; Submitting Evidence

§10.100, §10.101, §10.105

New Regulation: New provisions state that the employer may file a notice of injury, occupational disease, or death if the employee or survivor cannot do so. An informational statement that a claimant may withdraw a claim before it has been adjudicated has also been added:

Sec. 10.100 (a) To claim benefits under the FECA, an employee who sustains a work-related traumatic injury must give notice of the injury in writing on Form CA-1, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may give notice of injury on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. (b) For injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. (The form contains the necessary words of claim.) The requirements for filing notice are further described in 5 U.S.C. 8119. Also see Sec. 10.205 concerning time requirements for filing claims for continuation of pay. (1) If the claim is not filed within three years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may consist of written records or verbal notification. An entry into an employee's medical record may also satisfy this requirement if it is sufficient to place the employer on notice of a possible work-related injury or disease. (2) OWCP may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances (for example, being held prisoner of war). (3) The claimant may withdraw his or her claim (but not the notice of injury) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. Any continuation of pay (COP) granted to an employee after a claim is withdrawn

must be charged to sick or annual leave, or considered an overpayment of pay consistent with 5 U.S.C. 5584, at the employee's option. (c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

Sec. 10.101 (a) To claim benefits under the FECA, an employee who has a disease which he or she believes to be work-related must give notice of the condition in writing on Form CA-2, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may do so on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. The claimant may withdraw his or her claim (but not the notice of occupational disease) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. (b) For occupational diseases sustained as a result of exposure to injurious work factors that occurs on or after September 7, 1974, a notice of occupational disease must be filed within three years of the onset of the[[Page 65313]] condition.

Sec. 10.105 (a) If an employee dies from a work-related traumatic injury or an occupational disease, any survivor may file a claim for death benefits using Form CA-5 or CA-5b, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The survivor must provide this notice in writing and forward it to the employer. Another person, including the employer, may do so on the survivor's behalf. The survivor may also submit the completed Form CA-5 or CA-5b directly to OWCP. The survivor shall disclose the SSNs of all survivors on whose behalf claim for benefits is made in addition to the SSN of the deceased employee. The survivor may withdraw his or her claim (but not the notice of death) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. (b) For deaths that occur on or after September 7, 1974, a notice of death must be filed within three years of the death. The form contains the necessary words of claim. The requirements for timely filing are described in Sec. 10.100(b)(1) through (3). (c) However, in cases of death due to latent disability, the time for filing the claim does not begin to run until the survivor is aware, or reasonably should have been aware, of the causal relationship between the death and the employment (see 5 U.S.C. 8122(b)). (d) The filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim based on the same injury or occupational disease. If an injured employee or someone acting on the employee's behalf does not file a claim before the employee's death, the right to claim compensation for disability other than medical expenses ceases and does not survive. (e) A survivor must be alive to receive any payment; there is no vested right to such payment. A report as described in Sec. 10.414 of this part must be filed once each year to support

continuing payments of compensation.
. (The form contains the necessary words of claim.) The requirements for timely filing are described in Sec. 10.100(b)(1) through (3). (c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

Previous regulation: Previously, the regulations stated that written notice of injury, occupational disease or death may be given by the employee, or if the employee is unable to give notice, by any person acting on his or her behalf. However, the employer itself was not specifically mentioned. Also, no mention was previously made regarding an employee's right to withdraw a claim.

Subpart C – Continuation of Pay

§10.205, §10.207

New Regulation: A new provision states that COP use must begin within 45 days of the date of injury or the date a recurrence occurs:

Sec. 10.205 (a) To be eligible for COP, a person must: (1) Have a ``traumatic injury'' as defined at Sec. 10.5(ee) which is job-related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) File Form CA-1 within 30 days of the date of the injury (but if that form is not available, using another form would not alone preclude receipt); and (3) Begin losing time from work due to the traumatic injury within 45 days of the injury. (b) OWCP may find that the employee is not entitled to COP for other reasons consistent with the statute (see Sec. 10.220).

Sec. 10.207 May an employee who returns to work, then stops work again due to the effects of the injury, receive COP? If the employee recovers from disability and returns to work, then becomes disabled again and stops work, the employer shall pay any of the 45 days of entitlement to COP not used during the initial period of disability where: (a) The employee completes Form CA-2a and elects to receive regular pay; (b) OWCP did not deny the original claim for disability; (c) The disability recurs and the employee stops work within 45 days of the time the employee first returned to work following the initial period of disability; and (d) Pay has not been continued for the entire 45 days.

Previous regulation: In the previous regulation, use of COP was allowed for periods of disability beginning within 90 days of the date of injury or date of recurrence.

§10.216

New Regulation: This new provision states that the inclusion of differential and/or Sunday premium pay is only to be included in the calculation of the pay rate for COP

purposes if *not* otherwise prohibited by law. Pursuant to Section 630 of the Treasury, Postal Service and General Government Appropriations Act, as contained in section 101 (f) of Public Law 104-208, DoD will not be including these pay increments when computing the pay rate for COP purposes.

Sec. 10.216 The employer shall calculate COP using the period of time and the weekly pay rate. (a) The pay rate for COP purposes is equal to the employee's regular ``weekly'' pay (the average of the weekly pay over the preceding 52 weeks). (1) The pay rate excludes overtime pay, but includes other applicable extra pay except to the extent prohibited by law. (2) Changes in pay or salary (for example, promotion, demotion, within-grade increases, termination of a temporary detail, etc.) which would have otherwise occurred during the 45-day period are to be reflected in the weekly pay determination. (b) The weekly pay for COP purposes is determined according to the following formulas: (1) For full or part-time workers (permanent or temporary) who work the same number of hours each week of the year (or of the appointment), the weekly pay rate is the hourly pay rate (A) in effect on the date of injury multiplied by (x) the number of hours worked each week (B): A x B = Weekly Pay Rate. (2) For part-time workers (permanent or temporary) who do not work the same number of hours each week, but who do work each week of the year (or period of appointment), the weekly pay rate is an average of the weekly earnings, established by dividing (<divide>) the total earnings (excluding overtime) from the year immediately preceding the injury (A) by the number of weeks (or partial weeks) worked in that year (B): A <divide> B = Weekly Pay Rate. (3) For intermittent, seasonal and on-call workers, whether permanent or temporary, who do not work either the same number of hours or every week of the year (or period of appointment), the weekly pay rate is the average weekly earnings established by dividing (<divide>) the total earnings during the full 12-month period immediately preceding the date of injury (excluding overtime) (A), by the number of weeks (or partial weeks) worked during that year (B) (that is, A <divide> B); or 150 times the average daily wage earned in the employment during the days employed within the full year immediately preceding the date of injury divided by 52 weeks, whichever is greater.

Previous regulation: OWCP previously directed agencies to include these pay increments when computing the pay rate for COP purposes.

§10.222 (b)

New Regulation: This new provision allows the employer to terminate COP when a preliminary notice of disciplinary action issued before the injury becomes final or otherwise effective during the COP period, thereby ensuring that both the employee and the employer are placed in the same position as that which would have existed but for the injury:

Sec. 10.222 (b) An employer may not interrupt or stop COP to which the employee is otherwise entitled because of a disciplinary action, unless a preliminary notice was issued to the employee before the date of injury and the

action becomes final or otherwise takes effect during the COP period.

Previous regulation: The previous regulation stated that the final notice of termination of employment for cause must have been issued before the date of injury. OWCP found this to be an overly rigid rule, and in practice this enabled an injured worker to forego an impending disciplinary action by filing a disability claim and receiving COP in lieu of the impending termination of employment.

Subpart D – Medical and Related Benefits

§10.300 (b)

New Regulation: New provisions provide that the employer need not issue Form CA-16 more than one week after the date of injury:

b) The employer shall issue Form CA-16 within four hours of the claimed injury. If the employer gives verbal authorization for such care, he or she should issue a Form CA-16 within 48 hours. The employer is not required to issue a Form CA-16 more than one week after the occurrence of the claimed injury. The employer may not authorize examination or medical or other treatment in any case that OWCP has disallowed.

Previous regulation: Although this statement previously appeared in Publication CA-810, it was not included in the previous regulations.

§10.303

New Regulation: The new provision provides guidance concerning medical testing for exposures to workplace hazards, and states that the employer should not issue Form CA-16 to an employee who has merely been exposed to a workplace hazard but has not developed an injury or illness:

Sec. 10.303 (a) Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the FECA. The employer therefore should not use a Form CA-16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure. OWCP will authorize preventive treatment only under certain well-defined circumstances (see Sec. 10.313). (b) Employers may be required under other statutes or regulations to provide their employees with medical testing and/or other services in situations described in paragraph (a) of this section. For example, regulations issued by the Occupational Safety and Health Administration at 29 CFR chapter XVII require employers to provide their employees with medical consultations and/or examinations when they either exhibit symptoms consistent with exposure to a workplace hazard, or when an identifiable event such as a spill, leak or explosion occurs and results in the likelihood of exposure to a workplace hazard. In addition, 5 U.S.C. 7901 authorizes employers to establish health programs whose staff can perform tests for workplace hazards, counsel employees for exposure or

feared exposure to such hazards, and provide health care screening and other associated services.

Previous regulation: While it has been a longstanding practice of OWCP to discourage the use of Form CA-16 in these circumstances, the previous regulations did not contain a specific proscription against this practice as referenced above.

§10.314

New Regulation: This new provision states that attendant's allowances will now be paid as medical expenses, up to $1500 per month, which will allow for better monitoring of services and accounting of costs:

Sec. 10.314 OWCP will pay for the services of an attendant up to a maximum of $1,500 per month, where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. 8111(a), the Director has determined that, except where payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under Sec. 10.801. This decision is based on the following factors: (a) The additional payments authorized under section 8111(a) should not be necessary since OWCP will authorize payment for personal care services under 5 U.S.C. 8103, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual. (b) A home health aide, licensed practical nurse, or similarly trained individual is better able to provide quality personal care services, including assistance in feeding, bathing, and using the toilet. In the past, provision of supplemental compensation directly to injured employees may have encouraged family members to take on these responsibilities even though they may not have been trained to provide such services. By paying for the services under section 8103, OWCP can better determine whether the services provided are necessary and/or adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to OWCP, where the amount billed will be subject to OWCP's fee schedule, will result in greater fiscal accountability.

Previous regulation: Under the previous regulation, an allowance of up to $1500 per month was paid directly to the claimant as an addition to compensation for wage loss. There was no opportunity for OWCP to properly account for the expenditures, nor to monitor the quality of the services provided.

§10.323

New Regulation: This new provision states that the misbehavior of a representative is considered the misbehavior of the claimant for purposes of determining whether a medical examination has been obstructed.

Sec. 10.323 If an employee refuses to submit to or in any way obstructs an examination required by OWCP, his or her right to compensation under the FECA is suspended until such refusal or obstruction stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section. The employee will forfeit compensation otherwise paid or payable under the FECA for the period of the refusal or obstruction, and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. 8129.

Previous regulation: Under the previous regulations, while an attempt by the claimant to prevent or otherwise disrupt an OWCP ordered examination left him or her subject to a suspension of benefits, the behavior of the claimant's representative was not addressed.

§10.331

New Regulation: This new provision states that all medical reports should be submitted directly to OWCP as soon as possible after examination, and that the agency may request a copy of the report from OWCP; that the employer may use Form CA-17 to obtain interim reports regarding the duty status for all disabling injuries; that all reports must bear the physician's signature or signature stamp and that OWCP reserves to right to request an original signature on any report; and clarifies that narrative medical reports on physicians' letterhead may be substituted for medical forms:

Sec. 10.331 (a) Form CA-16 may be used for the initial medical report; Form CA-20 may be used for the initial report and for subsequent reports; and Form CA-20a may be used where continued compensation is claimed. Use of medical report forms is not required, however. The report may also be made in narrative form on the physician's letterhead stationery. The report should bear the physician's signature or signature stamp. OWCP may require an original signature on the report. (b) The report shall be submitted directly to OWCP as soon as possible after medical examination or treatment is received, either by the employee or the physician. (See also Sec. 10.210.) The employer may request a copy of the report from OWCP. The employer should use Form CA-17 to obtain interim reports concerning the duty status of an employee with a disabling injury.

Previous regulation: There was no indication that all medical evidence should be submitted to directly to OWCP rather than the employer, and there was no discussion addressing the signature requirement on all evidence submitted.

§10.331

New Regulation: This new provision states that OWCP will not always require submittal of an x-ray or the report of an x-ray to support a claim for subluxation of the spine:

Sec. 10.311 (a) The services of chiropractors that may be reimbursed are limited by the FECA to treatment to correct a spinal subluxation. The costs of physical and related laboratory tests performed by or required by a chiropractor to

diagnose such a subluxation are also payable. (b) In accordance with 5 U.S.C. 8101(3), a diagnosis of spinal ``subluxation as demonstrated by X-ray to exist'' must appear in the chiropractor's report before OWCP can consider payment of a chiropractor's bill. (c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request. (d) A chiropractor may also provide services in the nature of physical therapy under the direction of a qualified physician.

Previous regulation: While the previous regulations also stated that chiropractic serves are limited to treatment of a spinal subluxation as demonstrated to exist by x-rays, the regulations did not address whether submittal of the x-ray or x-ray report was necessary to establish the existence of said diagnosis.

§10.333

New Regulation: This new provision indicates that OWCP uses the American Medical Association's *Guides to the Evaluation of Permanent Impairment* for making schedule award determinations, and describes the kinds of measurements routinely used to make these determinations:

Sec. 10.333 To support a claim for a schedule award, a medical report must contain accurate measurements of the function of the organ or member, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment. These measurements may include: The actual degree of loss of active or passive motion or deformity; the amount of atrophy; the decrease, if any, in strength; the disturbance of sensation; and pain due to nerve impairment.

Previous regulation: No discussion of the standard for computing permanent impairment was included in the previous regulations.

Subpart E – Compensation and Related Benefits

§10.406

New Regulation: This provision states that maximum and minimum compensation rates do not include locality pay:

Sec. 10.406 (a) Compensation for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule. (Basic monthly pay does not include locality adjustments.) However, this limit does not apply to disability sustained in the performance of duty which was due to an assault which occurred during an attempted assassination of a Federal official described under 10 U.S.C. 351(a) or 1751(a). (b) Compensation for total disability may not be less than 75 percent of the basic monthly pay of the first step of grade 2 of the General Schedule or actual pay whichever is less.

(Basic monthly pay does not include locality adjustments.)

Previous regulation: The previous regulations stated that compensation may not exceed or be less than the specified percentage of the employee's monthly pay, rather than the "basic" monthly pay, and did not state whether locality pay adjustments were included.

§10.421

New Regulation: This section addresses concurrent receipt of compensation benefits along with other payments from the Federal government. New sections address elections between FECA and FERS, and appropriate reduction of FECA benefits to reflect Social Security entitlement due to federal service, as well as receipt of compensation concurrent to separation or severance pay:

Sec. 10.421 (a) 5 U.S.C. 8116(a) provides that a beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable. (b) An employee may receive compensation concurrently with military retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with 5 U.S.C. 5532(b). (c) An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay. (d) Pursuant to 5 U.S.C. 8116(d), a beneficiary may receive compensation under the FECA for either the death or disability of an employee concurrently with benefits under title II of the Social Security Act on account of the age or death of such employee. However, this provision of the FECA also requires OWCP to reduce the amount of any such compensation by the amount of any Social Security Act benefits that are attributable to the Federal service of the employee. (e) To determine the employee's entitlement to compensation, OWCP may require an employee to submit an affidavit or statement as to the receipt of any Federally funded or Federally assisted benefits. If an employee fails to submit such affidavit or statement within 30 days of the date of the request, his or her right to compensation shall be suspended until such time as the requested affidavit or statement is received. At that time compensation will be reinstated retroactive to the date of suspension provided the employee is entitled to such compensation.

Previous regulation: The new information regarding concurrent receipt of FECA and FERS benefits, as well as the information regarding separation and severance pay were not addressed in the previous regulations.

§10.430 §10.433 §10.437

New Regulation: These new provisions provide language addressing how claimants are

notified of compensation payments made and how this relates to potential overpayments of compensation; discusses when OWCP will consider waiving recovery of an overpayment; and corrects an error in the 1987 regulations discussing how OWCP applies the "against equity and good conscience test" for waiving overpayments:

Sec. 10.430 (a) In addition to providing narrative descriptions to recipients of benefits paid or payable, OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from the recipient's financial institution. (b) By these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment. If the amount received differs from the amount indicated on the written notice or bank statement, the recipient is responsible for notifying OWCP of the difference. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically.

Sec. 10.433 (a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.) (b) Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.

Sec. 10.437 (a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. (b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, OWCP does not consider the individual's current ability to repay the overpayment. (1) To establish that a

valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights. (2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.

Previous regulation: The previous regulations did not specifically address the manner in which OWCP advises claimants of compensation payments made and how this impacts on findings of fault regarding said overpayments, and contained erroneous information regarding how OWCP applies the "against equity and good conscience test" for waiving overpayments.

Subpart F – Continuing Benefits

§10.502

New Regulation: This new section discusses how OWCP evaluates and weighs medical evidence, and recognizes that if OWCP assigns greater weight to medical evidence supporting one conclusion over another, a decision awarding or denying benefits will be made based on the evidence found to carry greater weight:

Sec. 10.502 In considering the medical and factual evidence, OWCP will weigh the probative value of the attending physician's report, any second opinion physician's report, any other medical reports, or any other evidence in the file. If OWCP determines that the medical evidence supporting one conclusion is more consistent, logical, and well-reasoned than evidence supporting a contrary conclusion, OWCP will use the conclusion that is supported by the weight of the medical evidence as the basis for awarding or denying further benefits. If medical reports that are equally well-reasoned support inconsistent determinations of an issue under consideration, OWCP will direct the employee to undergo a referee examination to resolve the issue. The results of the referee examination will be given special weight in determining the issue.

Previous regulation: The previous regulations did not specifically discuss how OWCP evaluates medical evidence.

§10.505

New Regulation: This new provision recognizes that the Office of Personnel Management, rather than OWCP, administers 5 U.S.C. 8151, which discusses retention rights following recovery from an injury:

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work under Sec.

10.210 and as defined in this subpart. The term ``return to work'' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered after one year. The Office of Personnel Management (not OWCP) administers this provision. (a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions. (b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury.

Previous regulation: The previous regulations did not address who governed the employee's retention rights following recovery from a compensable injury, thereby often causing confusion among claimants and employers in regards to who's auspices this regulation came under.

§10.506

New Regulation: This new provisions allows employers to contact employees at reasonable intervals to request medical reports addressing return to work, while restricting contact to written inquiries:

Sec. 10.506. The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA-17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.[1]) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

Previous regulation: This is a new provision that did not appear previously.

§10.509

In their comments attached to the final rule, OWCP indicated that they concurred with two labor organizations' suggestions that employers should only be allowed to contact injured workers, as well as physicians, in writing. However, this provision restricting employer contact with the employee was not added to the regulations.

New Regulation: This new provision addresses reductions-in-force (RIFs) of employees performing light duty work, and states that loss of a job in this matter is not considered a recurrence of disability. Further, it states that for a light-duty position to fairly and reasonably represent an injured worker's wage-earning capacity, it must be a classified position to which to injured worker has been formally reassigned, it must conform to the injured worker's physical limitations, and the employer must have already prepared a written description such that the position constitutes "regular" Federal employment:

Sec. 10.509(a) In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in Sec. 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. When this occurs, OWCP will determine the employee's wage-earning capacity based on his or her actual earnings in such light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made. (b) For the purposes of this section only, a light-duty position means a classified position to which the injured employee has been formally reassigned that conforms to the established physical limitations of the injured employee and for which the employer has already prepared a written position description such that the position constitutes ``regular'' Federal employment. In the absence of a ``light-duty position'' as described in this paragraph, OWCP will assume that the employee was instead engaged in non-competitive employment which does not represent the employee's wage-earning capacity, i.e., work of the type provided to injured employees who cannot otherwise be employed by the Federal Government or in any well-known branch of the general labor market.

Previous regulation: The previous regulations did not address the impact on entitlement to continuing compensation benefits of a partially disabled employee who is performing light-duty work and is subsequently RIF'd, nor did they discuss under what circumstances a light-duty position could be found to represent the injured worker's wage-earning capacity. However, both of these provisions have been consistent with established ECAB precedent.

§10.518

New Regulation: This new provision brings the services of OWCP field nurses within the definition of vocational rehabilitation services, and thus allows that sanctions may be applied for failure to cooperate with the services of an assigned field nurse:

Sec. 10.518 (a) OWCP may, in its discretion, provide vocational rehabilitation services as authorized by 5 U.S.C. 8104. These services include assistance from registered nurses working under the direction of OWCP. Among other things, these nurses visit the worksite, ensure that the duties of the position do not exceed the medical limitations as represented by the weight of medical evidence established by OWCP, and address any problems the employee may have in adjusting to the work setting. The nurses do not evaluate medical evidence;

OWCP claims staff perform this function. (b) Vocational rehabilitation services may also include vocational evaluation, testing, training, and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury. These services also include functional capacity evaluations, which help to tailor individual rehabilitation programs to employees' physical reconditioning and behavioral modification needs, and help employees to meet the demands of current or potential jobs.

Previous regulation: Previously, OWCP nurse services did not come under the definition of vocational rehabilitation services, and thus sanctions could not be applied for a claimant's failure to cooperate with the services of an OWCP nurse.

§10.526

New Regulation: This new section sets forth an injured worker's responsibility to report volunteer activities:

Sec. 10.526 An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work.

Previous regulation: No previous discussion of volunteer activities was offered in the previous regulations.

§10.527

New Regulation: The language of this section has been added to inform employees and others that OWCP verifies reports of earnings in a number of ways, including computer matching with other government entities:

Sec. 10.527 To make proper determinations of an employee's entitlement to benefits, OWCP may verify the earnings reported by the employee through a variety of means, including but not limited to computer matches with the Office of Personnel Management and inquiries to the Social Security Administration. Also, OWCP may perform computer matches with records of State agencies, including but not limited to workers' compensation administrations, to determine whether private employers are paying workers' compensation insurance premiums for recipients of benefits under the FECA.

Previous regulation: This provision was not included in the previous regulations.

Subpart G – Appeals Process

§10.610

New Regulation: This provision was added in the interests of clarifying the distinction between a reconsideration and a review of a decision on the Director's own motion. A claimant cannot request or apply for a review by the Director, and any such request will be considered as a request for reconsideration:

Sec. 10.610 The FECA specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained. (a) The decision whether or not to review an award under this section is solely within the discretion of the Director. The Director's exercise of this discretion is not subject to review by the ECAB, nor can it be the subject of a reconsideration or hearing request. (b) Where the Director reviews an award on his or her own motion, any resulting decision is subject as appropriate to reconsideration, a hearing and/or appeal to the ECAB. Jurisdiction on review or on appeal to ECAB is limited to a review of the merits of the resulting decision. The Director's determination to review the award is not reviewable.

Previous regulation: This distinction was not specifically spelled out in the previous regulations, thereby causing confusion among some claimants who saw a request for a review by the Director as another right of appeal.

§10.619

New Regulation: This new provision states that subpoenas are only to be issued in connection with a hearing, and only as a last resort. It also places other restrictions on issuance of subpoenas not previously addressed in the regulations:

Sec. 10.619 A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts. (a) A claimant may request a subpoena only as part of the hearings process, and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must: (1) Submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request. (2) Explain why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained. (b) No subpoena will be issued for attendance of employees of OWCP acting in their official capacities as decision-makers or policy administrators. For hearings taking the form of a review of the written record, no subpoena for the appearance of witnesses will be considered.

(c) The hearing representative issues the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing.

Previous regulation: The previous regulations did not state that issuance of a subpoena is solely within the discretion of the hearing representative, that it is only to be used as a last resort, and that a subpoena may only be issued in connection with a hearing.

§10.621

New Regulation: This revision states that a hearing representative may deny a claimant's request that an employing agency representative testify where the claimant cannot establish that such testimony would be relevant, or because the representative does not have the appropriate level of knowledge:

Sec. 10.621 (a) The employer may send one (or more, where appropriate) representative(s) to observe the proceeding, but the agency representative cannot give testimony or argument or otherwise participate in the hearing, except where the claimant or the hearing representative specifically asks the agency representative to testify. (b) The hearing representative may deny a request by the claimant that the agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing. The employer may also comment on the hearing transcript, as described in Sec. 10.617(e).

Previous regulation: The previous regulations provided no such provision.

§10.622

New Regulation: This new provision states that postponement of an oral hearing cannot be postponed once the hearing is scheduled and written notice is provided to the claimant, unless the hearing can be rescheduled for the same docket. The only exceptions to this provision are the claimant's non-elective hospitalization or the death of an immediate family member:

Sec. 10.622 (a) The claimant and/or representative may withdraw the hearing request at any time up to and including the day the hearing is held, or the decision issued. Withdrawing the hearing request means the record is returned to the jurisdiction of the district office and no further requests for a hearing on the underlying decision will be considered. (b) OWCP will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can

reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. (c) Where the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse, or child prevents attendance at the hearing, a postponement may be granted upon proper documentation.

Previous regulation: The previous regulations stated that a scheduled hearing may be postponed by written notice received by the Office at least three days prior to the scheduled date of the hearing, and when good cause for the postponement is shown.

Subpart H – Special Provisions

§10.701

New Regulation: This provision allows Federal employees to serve as a representative of the injured worker only under certain limited circumstances:

Sec. 10.701 A claimant may authorize any individual to represent him or her in regard to a claim under the FECA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A Federal employee may act as a representative only: (a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or (b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.

Previous regulation: The previous regulations stated that an injured worker may authorize any individual to represent him or her in a claim before OWCP, without further elaboration.

§10.703

New Regulation: This new provision streamlines the standards for review of representatives' fees, allowing for immediate approval of a fee request when the claimant does not dispute the amount of the fee:

Sec. 10.703 (a) Fee Application. (1) The representative must submit the fee application to the district office and/or the Branch of Hearings and Review, according to where the work for which the fee is charged was performed. The application shall contain the following: (i) An itemized statement showing the representative's hourly rate, the number of hours worked and specifically identifying the work performed and a total amount charged for the representation (excluding administrative costs).[[Page 65332]] (ii) A statement of agreement or disagreement with the amount charged, signed by the claimant. The statement

must also acknowledge that the claimant is aware that he or she must pay the fees and that OWCP is not responsible for paying the fee or other costs. (2) An incomplete application will be returned with no further comment. (b) Approval where there is no dispute. Where a fee application is accompanied by a signed statement indicating the claimant's agreement with the fee as described in paragraph (a)(1)(ii) of this section, the application is deemed approved. (c) Disputed requests. (1) Where the claimant disagrees with the amount of the fee, as indicated in the statement accompanying the submittal, OWCP will evaluate the objection and decide whether or not to approve the request. OWCP will provide a copy of the request to the claimant and ask him or her to submit any further information in support of the objection within 15 days from the date the request is forwarded. After that period has passed, OWCP will evaluate the information received to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services; (ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services. (2) Where the claimant disputes the representative's request and files an objection with OWCP, an appealable deision will be issued.

Previous regulation: Under the previous regulations, all fee approval requests required review by OWCP, regardless of whether the amount of the fee was in dispute or not.

§10.705 to §10.719

New Regulation: These new sections explain, interpret, and clarify duties of FECA claimants and their counsel in regards to third-party liability, pursuant to 5 U.S.C. 8131 and 8132. The following summarizes the major changes instituted with the enacting of the new regulations:

- §10.710 has been added to the regulations to clarify that any person who has filed a FECA claim that has been accepted or who has received FECA benefits in connection with a claim filed by another person must report any receipt of money or other property as a result of the liability arising out of that injury to OWCP or the Solicitor of Labor (SOL) within 30 days of receipt.
- §10.711 has been added to provide a step by step explanation of the calculation of the refund to be paid to the United States and any credit against future benefits calculated in accordance with the formula contained in section 8132 of the FECA. The only change here from the previous regulations is elimination of the ability to offset payment of medical expenses to federal facilities or other parties from any recovery.
- §10.713 has been incorporated to require that a FECA beneficiary who receives a structured settlement (one which provides for payment of funds over a specified period of time rather than immediately) report as the gross recovery the present value of the right to receive all of the payments called for in the settlement. While keeping to the language of 5 U.S.C. 8132, this new definition is intended to overrule the holding of the Employees' Compensation

Appeals Board (ECAB) in Benjamin S. Purser, Jr., 42 ECAB 204 (1990).

§10.714 sets forth the manner in which OWCP calculates disbursements which it makes in connection with a FECA claim to be refunded in accordance with the formula set out in section 8132 of the FECA and §10.711 of the new regulations. The only change from the previous regulations is to allow for subtraction from the total of refundable disbursements of the cost of the any medical examination that the FECA beneficiary establishes that the employing agency should have made available at no charge to the employee under a statute other than the FECA.

§10.715 states that OWCP will now impose interest charges on refunds due to the United States pursuant to section 8132 of the FECA.

§10.716 allows collection of such refunds referenced in §10.715 by withholding from payments currently payable under the FECA.

§10.719 has been added to interpret the phrase "same injury" for the purposes of implementing section 8132 of the FECA. Under this definition, separate injuries occurring during the same incident or exposure will be treated as one injury for the purpose of calculating any required refund or credit against future benefits.

Previous regulation: Previously, the regulations simply restated the provisions of sections 8131 and 8132 of the FECA. The changes referenced above did not appear in the previous regulations.

Subpart I – Information for Medical Providers

§10.809 and §10.810

New regulation: This new provision expands OWCP's medical fee schedule to now include pharmacy and inpatient hospital bills:

Sec. 10.809 Payment for medicinal drugs prescribed by physicians shall not exceed the amount derived by multiplying the average wholesale price of the medication by the quantity or amount provided, plus a dispensing fee. (a) All prescription medications identified by National Drug Code (NDC) will be assigned an average wholesale price representing the product's nationally recognized wholesale price as determined by surveys of manufacturers and wholesalers. The Director will establish the dispensing fee. (b) The NDCs, the average wholesale prices, and the dispensing fee shall be reviewed from time to time and updated as necessary.

Sec. 10.810 (a) OWCP will pay for inpatient medical services according to pre-determined, condition-specific rates based on the Prospective Payment System (PPS) devised by HCFA (42 CFR parts 412, 413, 424, 485, and 489). Using this system, payment is derived by multiplying the diagnosis-related group (DRG) weight assigned to the hospital discharge by the provider-specific factors. (1) All hospital discharges will be classified according to the DRGs prescribed by the HCFA in the form of the DRG Grouper software program. On this list, each DRG

represents the average resources necessary to provide care in a case in that DRG relative to the national average of resources consumed per case. (2) The provider-specific factors will be provided by HCFA in the form of their PPS Pricer software program. The software takes into consideration the type of facility, census division, actual geographic location (MSA) of the hospital, case mix cost per discharge, number of hospital beds, intern/beds ratio, operating cost to charge ratio, and other factors used by HCFA to determine the specific rate for a hospital discharge under their PPS. The Director may devise price adjustment factors as appropriate using OWCP's processing experience and internal data. (3) OWCP will base payments to facilities excluded from HCFA's PPS on consideration of detailed medical reports and other evidence. (4) The Director shall review the pre-determined hospital rates at least once a year, and may adjust any or all components when he or she deems it necessary or appropriate. (b) The Director shall review the schedule of fees at least once a year, and may adjust the schedule or any of its components when he or she deems it necessary or appropriate.

Previous regulation: Pharmacy and inpatient hospital bills were not subject to the fee schedule.